

THE FUTURE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: PROMOTION VERSUS EXPOSURE

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INTRODUCTION: WHY “PROMOTION” IS PROBLEMATICAL

Every complex institution has certain unwritten but clear understandings implicit in its practices its common law, as it were and embedded in its idiom. The United Nations is no exception. In the practice of the UN Commission on Human Rights, for instance, a decision to appoint a Special Rapporteur to investigate allegedly grave and patterned violations of human rights in a member state is itself a severe reprimand, signifying that the state in question is the source of a disgusting stench.¹ For the Commission, composed as it is of instructed state representatives, begins with the presumption that all is well within all of the UN's sovereign members, a presumption it transcends only with reluctance, only in the face of powerful disconfirming evidence. Appointing a rapporteur an independent expert with a mandate to investigate and report, and in the process to seek permission to enter the target country and interrogate its citizens about the behavior of their government, so that the latter appears to stand in the dock as a prima facie felon: that is piercing with a vengeance the chain-mail curtain of sovereignty supposedly forged three and one-half centuries ago by the artisans of Westphalia.

Precisely because appointment implies condemnation by a broad cross-section of the globe's sovereigns, including those peculiarly enchanted with the prerogatives of national independence, states wriggle and writhe, threaten and promise in order to resist it. Thus the threat of appointment is a weapon in the generally meager arsenal of international enforcement, a means of possibly inducing prophylactic mitiga-

1. See generally, T. Farer and F. Gaer, "The UN and Human Rights: At the End of the Beginning," in Adam Roberts and Benedict Kingsbury, *United Nations, Divided World* (Oxford: Clarendon Paperbacks 2nd ed., 1993) pp. 240-296.

tion of the offensive behavior which has placed the concerned state on the list of likely subjects for an expert's report. Being the most powerful **weapon of collective action** against human rights violations other of course than economic sanctions which the member states, living in glass houses themselves and ever **reluctant** to interfere with the sanctity of commerce, will very rarely employ it is and, realistically, can only be used sparingly.

Regrettably, the number of credible cases of serious human rights violations does not conform to the principle of sparing use. Hence, lest it be limited to doing nothing, the Commission deploys softer penalties. These penalties take the form of decisions understood to imply that while not all is well in the kingdom of Slobovia, either it is less than a living hell or the hell is at least partially the offspring of factors and forces not plainly subject to the state's control. In the Commission's practice, there is a brief hierarchy of what we might then call "preliminarily censorious actions" with the rapporteur's appointment at its apex. At its base lies what is called in the Commission's idiom "Advisory Services."

In theory, a resolution authorizing "Advisory Services" and the concomitant appointment of an independent expert to provide them is not a sanction at all, not even the lightest of wrist taps. On the surface it implies only that, by reason not of state policy but of certain administrative difficulties which the concerned government cannot readily overcome by itself, human rights protection falls short of international standards. Therefore, being eager to improve, it seeks assistance. In fact, the good faith implied by the nature of the Commission's response is often susceptible to doubt on the part of Commission members. Rare is the government, after all, in which human rights zeal is uniform among political leaders. Authorization of assistance may be intended to convey the judgment that the situation in the country has improved or, conversely, that it is not yet nearly as grave or pervasive as in certain other countries on the list of problem cases. In either case, the resolution calling for assistance is understood by everyone as being also a declaration of concern about the condition of human rights in the subject state. But the concern and attendant criticism is comparatively soft. And so when countries full of human rights violations determine that they cannot entirely deflect reference to their behavior, they naturally campaign for advisory services as a happy alternative to the appointment or reappointment of a rapporteur or a special representative of the Secretary-General.²

2. "A rough hierarchy has been emerging, with 'Special Rapporteur' . . . at the top, followed by 'Special Representative' of the Secretary-General . . . and by 'Independent Expert' . . . who may operate either under the resolution 1235 'Gross Violations' agenda topic where country situations are normally considered, or under 'Advisory Services'. The latter is nominally at the request of the government involved, and presumed to be a less confrontational form of attention to a country deemed less deserving of the opprobrium of being designated under the 'violations' rubric . . ." Farer and Gaer, p. 284.

The Organization of American States (OAS) has not established technical assistance as a formal part of its sanctions pyramid; assistance is available, but only for the narrowly focused purpose of strengthening certain aspects of representative government and then through the Unit for Democracy rather than the independent Commission for Human Rights³ Hence, responding before the Commission to allegations of human rights violations by requesting technical assistance is a ploy not open to member states. Preeminent among those defensive ploys that are available, other than implausible factual claims and the no longer resonant insistence that the Commission's inquiries and conclusions intrude on national sovereignty, is a demand that the Commission shift its programmatic focus from investigation to *promotion*.

A change in emphasis is required, advocates claim, because there has been an altogether radical change in the states that are the subjects of the Commission's jurisdiction.⁴ Largely authoritarian during the era when the Commission began fully to exercise its power to investigate and expose, now they are uniformly democratic, with the single and jurisdictionally problematic⁵ exception of Cuba. This change, it is often more implied than said, transforms the relationship between the Commission and its subjects. Authoritarian states were by their nature violators of human rights and had at best an uncertain capacity for reforming themselves. By contrast, elected governments share with the Commission the values the latter is authorized to defend and, because they must regularly face the judgment of their own populations, have a powerful incentive to avoid abuse; and if that incentive proves insufficient, domestic forces can remove them. Abuses may occur, but nor-

3. For a summary and critique of the Unit's activities, see "The Inter-American Agenda and Multilateral Governance," A Report of the Inter-American Dialogue Study Group on Western Hemisphere Governance, Washington, D.C. April 1997, pp. 13-15.
4. Some writers who presumably seek actually to strengthen the Inter-American human rights system have taken this line. See, for instance, *Toward a New Vision of the Inter-American Human Rights System* (hereinafter referred to as *New Vision*), a document prepared by the General Secretariat of the OAS for presentation to the Organization's Permanent Council (OEA/Ser.G. CP/doc.2828/96. 26 November 1996): "Once, in a not too distant past, our hemisphere was known for large-scale systematic violations of human rights. Today, we are a Hemisphere of expanding trade opportunities, of growth, and of emerging and strengthening democratic values. We are living a new moment."
5. The Commission has jurisdiction over Cuba only if the Cuban state remains a member of the OAS. In 1962, a two-thirds majority of the Organization resolved to suspend the Government of Cuba on the grounds that its alliance with the Soviet Union was incompatible with the principles and purposes of the Organization. Cuba denounced the suspension as an act unauthorized by the Charter and hence *ultra vires*. Thereafter, while it did not formally withdraw from the OAS, it refused to recognize the jurisdiction of any of its organs, including the Commission. For its part, the Commission took the view that absent a formal withdrawal, Cuba remained a member. Members recognized the problematic character of their conclusion but decided that concern for the protection of human rights justified the resolution of this contested legal issue in favor of jurisdiction. For an elaboration of the Commission's position, see its *Seventh Report on the Condition of Human Rights in Cuba* (OAS/Ser.L/V/II.61, doc.29 rev.1, 4 October, 1983) pp.10-14.

mally they will result from the weakness of elected leaders and state institutions. Weakness being the problem, exposure and condemnation are not solutions. On the contrary, by tending to delegitimize public authority, they perversely weaken it further and will thus tend to aggravate the very conditions of which the Commission complains. In short, elected governments need not indictment in the court of international opinion but rather help. Hence the case for promotion.

This cluster of claims, among which I include the supposed virtues of *promotion*, raises four questions. One is whether all of the Hemisphere's elected regimes can reasonably be described as "democracies." An overlapping second question is whether elected regimes are by their nature imbued with human rights values or at least pushed by the nature of their authority to defend those values. A third question is whether, in the altered political conditions of the Hemisphere, Commission investigations are at best a relatively inefficient use of human and material resources and, at worst, an inadvertent way of undermining the very authority required for the effective defense of human rights. And finally, the question of whether the Commission enjoys the capacity, much less some comparative advantage as an agent of promotion. In the remainder of this brief essay I will try to illuminate these questions and suggest answers.

Human Rights and Elected Governments: How Close the Bond?

At the outset of their impressive survey of democracy in developing countries, Juan Linz, Seymour Martin Lipset and Larry Diamond define democracy as

"... a system of government that meets three essential conditions: meaningful and extensive *competition* among individuals and groups (especially political parties) for all effective positions of government power, at regular intervals and excluding the use of force; a highly inclusive level of *political* participation in the selection of leaders and policies, at least through regular and fair elections, such that no major (adult) social group is excluded; and a level of *civil and political liberties* freedom of expression, freedom of the press, freedom to form and join organizations sufficient to ensure the integrity of political competition and participation".⁶

In a subsequent piece, Diamond, the co-editor of the *Journal of Democracy*, correctly notes that states lie across a broad continuum reflecting varying degrees of success in satisfying these criteria. But if the term "democracy" is to have any descriptive value, then clearly lines must be drawn, at least so as to exclude states which Diamond calls "semidemocracies," defined as those in which "the effective power of elected officials is so limited, or political party competition is so restricted, or the freedom and fairness of elections so compromised that electoral outcomes, while competitive, still deviate significantly from popular preferences; and/or where civil and political liberties are so limited that some political orienta-

6. *Democracy in Developing Countries: Latin America* (Boulder: Lynne Rienner, 1988, 1989), xvi.

tions and interests are unable to organize and express themselves".⁷ Beyond even them are authoritarian regimes, those in which elections, if they are held, have only a marginal influence on the distribution of power and the shape of policy. Looking in 1994 at the twenty-two Latin American states with populations in excess of one million, Diamond found only about half sufficiently satisfied the defining criteria to justify application of the democratic rubric and, he argues persuasively, about a half of that half satisfied them only barely.⁸

Today the scorecard looks slightly different. Mexico, home for about one-third of Latin America's population, has recently held the first genuinely competitive national elections in its modern history. And in Paraguay, an elected government backed by fellow members of the Mercosur free trading group, managed (barely) to turn back an outright military challenge to its authority. But it may correspondingly have deteriorated in other countries: Colombia, for instance, where in significant portions of the national territory guerrilla and paramilitary groups appear to have wrested effective power from the elected government. What remains unchanged in many states with elected governments are gross deviations from the paradigm.

Among the more common deviations, three predominate. One is de facto restrictions on effective participation by indigenous peoples in states where they are a substantial presence. In Guatemala, for instance, where they form a majority of the population, exclusion has been no less ferocious than purposeful. A second is the continued failure in many countries to subordinate the military institution to civilian control and civil jurisdiction. The third is a system of justice which does not fairly and expeditiously apply the authoritative rules promulgated by elected officials of the legislative and executive branches. Police and courts bring those rules to bear on the general population, investing their contextless generalizations with specific content. If decisions by the police (including decisions to do nothing) concerning investigation, arrest, detention and treatment of persons with whom they come into contact do not fit closely with legislative norms, democracy is eviscerated. The same is true where, as is true in most of Latin America, the poor are effectively denied access to the courts and/or cannot anticipate with confidence a decision based on applicable norms. A country with an elected national government but in which the denial of justice is commonplace is like a car endowed with a motor unconnected to its wheels.

Contested elections, in short, are only one dimension of a functioning democracy. That dimension has indisputably changed. Important other dimensions have not or

7. "Democracy in Latin America: Degrees, Illusions, and Directions for Consolidation," in Tom Farer, ed., *Beyond Sovereignty* (Baltimore: The Johns Hopkins University Press, 1996) 56, quoting from *Democracy in Developing Countries*, xvii.

8. *Id.* at 61.

certainly not to the same degree. Through sustained political competition, some or all of those other dimensions may be correspondingly altered. That is, however, far from inevitable, perhaps most clearly in the case of hitherto excluded groups, indigenous people and, more generally, the popular classes, for their inclusion may be or at least appear to be antithetical to the interests of the extant, relatively privileged electorate even more than to those of its elite political leaders. In any event, taking the Hemisphere as it is now, claims that the political context for the Commission's work has been quite simply transformed appear decidedly premature.

While change has not been comprehensively transformative, certainly it has been consequential. But for whom? Above all for the middle and upper-middle classes. Beginning in the late 1960s, they suddenly found themselves vulnerable to arbitrary arrest and detention, torture and summary execution just as members of the popular classes always had been. Being in most countries by virtue of their organizational capacity, education and political sophistication the dominant segment of the national electorate, the comfortable classes are once again equipped to look after their own defenses. Moreover, and perhaps more important, the triumph of *liberal-capitalist* ideology has eliminated the threat which led many class members to accept the risks of a military-dominated terror state in preference to those associated with a revolutionary one. Aside from being a means to an end, participation may be seen as a good in itself, an aspect of human dignity. Moreover, the triumph of a liberal rather than authoritarian-capitalist ideology holds out at least some hope for the gradual extension of protection to the lower classes as political elites compete for votes in an atmosphere relatively free of class fears about electoral revolutions and the consequent confiscation of the propertied.

Arguably something much like this occurred in Britain and part of Northern Europe in the course of the Nineteenth Century industrial revolution. But that was also a period of growing labor shortages (because death rates were not yet low while the rate of migration, primarily to the Western Hemisphere, was high). Increased demand for unskilled labor and the increasing organization of the working classes combined to improve the economic conditions of the lower classes who gradually, very gradually, became to some extent embourgeoised. Latin America remains far from those conditions. Un- and semi-skilled labor remains in excess supply and national capital, able to skip casually about the globe in search of optimal profit, is as likely to invest abroad as at home. As long as the lower classes remain marginally employed or employed at poverty-level wages, their full incorporation into the political and justice systems can appear threatening to, even if at the same time demanded by liberal-capitalist values.

Can liberal-capitalist societies run, as it were, a two-track system? South Africa's two-track system elections and the rule of law for a fraction of the national population collapsed under the weight of the exclusionary effort. Long before the release of Mandela, the rule of law and other aspects of a human rights regime had become hopelessly compromised even for Whites.

But South Africa, after all, was not a liberal-capitalist order, because it excluded on the basis of race rather than money and competence (that is ability to contribute to profit-making or to the maintenance of the institutional context required for the efficient operation of market forces). Its ascriptive criteria prevented partial and progressive incorporation of initially excluded elements. South Africa's implosion is not, therefore, inconsistent with the hypothesis that a market economy in which peculiarly talented and lucky members of the poorer classes could rise in the class structure one, that is, which in effect skimmed off the cream of the poor could endure indefinitely.

The Nature and Function of the Commission's General Reports

Cases vs. Reports The Commission has executed its enforcement duties almost exclusively through the medium of individual cases and general inquiries into the condition of human rights in particular countries.⁹ From its inception in 1960 until 1973, when the Chilean military staged a bloody coup against the elected government of Salvador Allende, the case load was minuscule fewer than thirty a year in a Hemisphere rife with human rights delinquencies. Following the Chilean coup with its attendant reign of terror, the case load metastasized, quickly reaching into the thousands and then more than doubling as additional cases poured in from many countries, above all from Argentina where more than six thousand were opened in three horrendous years culminating in the Commission's 1979 on-site visit.¹⁰

Even if they had been endowed with the authority to compel testimony and the presentation of documents, the seven Commissioners meeting for two weeks at approximately four-month intervals and their exiguous staff could not have resolved more than a handful. Indeed a Commission several times the size and working without pause could not have coped with the torrent of cases washing into the Commission's Washington offices, the vast majority of which satisfied its criteria for substantive consideration: That is, they stated facts which, if true, would constitute a violation of the human rights enumerated in the American Declaration and Convention and the exhaustion of credible internal remedies. Moreover, until the

9. For an overview of the Commission's work, see Tom Farer, "No Longer a Unicorn, Not yet an Ox," *Human Rights Quarterly* August, 1997, Volume 19, N° 3, pp.510-546.

10. See *Report on the Situation of Human Rights in Argentina*, (OAS/Ser.L/V/II.49, doc.19 corr.1, 11 April, 1980).

waning of state terror and the coincident gradual restoration of elected governments in the 1980s, practically none of the countries from which cases poured were parties to the American Convention. When dealing with non-parties, the Commission's authority flowed from the Charter of the Organization of American States (OAS) and its statute and regulations as approved by the OAS General

Assembly. While those sources authorized the consideration of individual cases, they did not lay out hearing procedures. In light of that omission, the Commission operated on the assumption that it lacked authority to insist on formal hearings and to pressure governments to produce witnesses and documents by threatening them with adverse findings if the requested evidence were not forthcoming.

In any event, the resolution of individual cases was, in comparison with a single comprehensive report on human rights conditions in a country, a deeply inefficient way of conveying to the Commission's multiple audiences officials and citizens of the target state, the governments of other OAS member-states, the peoples of the Hemisphere a vivid sense of what was going on inside terror states. Nor could they do much for victims and their families until most states had accepted the jurisdiction of the Inter-American Court, since only it could reach legally-binding conclusions, order a person's release from custody, enjoin harassment and require compensation. Now, with widespread acceptance of its jurisdiction, this second consideration is mooted; and so, on that ground alone, the Commission is plainly obligated to devote more of its resources to the provisional resolution of cases and the identification of those which should be submitted to the Court for final action.¹¹

Cases in the European human rights system almost invariably raise questions of law under the European Convention.¹² In the past, the parties have rarely disagreed about the facts. When the European Court finds in favor of a complainant, of course it fashions a remedy for the particular injury. Coincidentally, it protects all potential future complainants under roughly the same set of facts. This is true in part because the courts of many state-parties to the Convention are constitutionally obligated to treat the Convention as a component of (or as if it were a component of) domestic law and in part because in addition to enforcing the Court's judgment, they should treat as binding its interpretation of the Convention. One may wonder whether this happy condition will continue now that the former communist states of central and eastern Europe have formally adhered to the system. They can hardly be said to have long enjoyed democracy, constitutional government and a rule-of-law culture. Whatever the future may hold, the European system's past illustrates the conditions in which cases have a powerful leveraging effect on human rights.

11. See *New Vision*, note 4 above. Overall, this is a superior piece of analysis, diagnosis and prescription for which its author deserves praise.

12. On the European system, see generally Ralph Beddard, *Human Rights and Europe*, (Cambridge: Grotius Publications, 1993).

Those conditions are not the Latin America norm. Only a contemporary Pangloss would expect decisions of the Inter-American Court to resonate powerfully through the Hemisphere's plodding and erratic judicial systems. When even morally-neutered institutions like the Development Banks announce that good governance is essential to sustained economic growth and that the rule-of-law is an integral part of good governance, we have reason to hope for substantial reform. But between the promise and the present there remains a chasm. Nor is the difference between Europe and Latin American limited to the justice system. In the former, state security agencies have, to be sure, sometimes tested the legal limits on the means they can employ to maintain order and protect other state interests. They have occasionally pushed into grey areas: British interrogation methods in Northern Ireland is a case in point.¹³ What West European Governments have not done, however, is to authorize security forces to crash through undoubted legal restraints and then brazenly deny their delinquencies. Nor have they relinquished responsibility to control security forces insensible to legal and moral restraint or exercised those responsibilities with manifest inefficacy. Well-documented reports from the Commission¹⁴ and from non-governmental organizations like Human Rights Watch¹⁵ emphatically support the conclusion that what has not been done in Western Europe continues to be done in the Western Hemisphere on an impressive scale.

The result of extant differences between the European and Inter-American setting for human rights enforcement is a relatively diminished (albeit not trivial) protective role in the latter for adjudication. General inquiries are not part of the European Commission's armory. If they were, would they be as efficient an instrument of protection as they have been and, I believe, still are for the Inter-American Commission. Until the former communist countries became parties to the Convention, the answer had to be "no," since, as I noted above, before that time practically all of the states participating in the human rights regime were basically in compliance and committed to compliance with Convention norms. Constrained by their particular facts, individual cases, even clusters of them, cannot convey as efficiently as general reports an overall sense of how a system of governance functions. They leave governments with the option of dismissing them as exceptions, particularly where they turn on questions of fact ("was the petitioner tortured after

13. *Id.* at 146-158.

14. See, for instance, the following Commission reports: *Report on the Situation of Human Rights in Haiti*, (OAS/Ser.L/V/II.88, doc.10 rev. 1995); *Report on the Situation of Human Rights in El Salvador*, (OAS/Ser.L/V/II.85, doc.28, rev. 1994); *Report on the Situation of Human Rights in Colombia*, (OAS/Ser.L/V/II.84, doc.39, rev. 1993); *Report on the Situation of Human Rights in Guatemala*, (OAS/Ser.L/V/II.83, doc.16, 1993); *Report on the Situation of Human Rights in Peru*, (OAS/Ser.L/V/II.83, doc.31, 1993).

15. See, for instance, *Untold Terror: Violence Against Women in Peru's Armed Conflict* (New York: Human Rights Watch, 1992).

his arrest?") rather than law ("Do sleep deprivation, hooding, threats, and violent shaking constitute torture?").

True, there is precedent for a commission or a court using the remedial phase of a case to recommend (in the commission's case) or order (in the court's) a generalized response to its finding of fault, a change in institutional behavior. Either might, for instance, insist that a person detained be brought quickly before a civilian court or call for the videotaping of interrogation, etc. But suppose the practice which generated the case is part of a larger strategy of extreme measures which is authorized or at least tolerated by senior elected officials? In that event, one may reasonably presume that the prohibited practices or others much like them will continue until either a new calculation of benefits and risks drives officials to jettison extreme measures or by the continued employment of those measures they finally liquidate the perceived threat to their interests. A competent general report can credibly expose the overall strategy by illuminating a general pattern of delinquency together with its roots and rationale. Hence reports are bound to be far more important vehicles of human rights enforcement in regions like the Western Hemisphere than in Western Europe.

The Structure and Function of Reports Paradoxically, they are likely to be more effective in the contemporary democratic moment than during the preceding era of state terror. The paradox stems from both the reporting process and the potential consequences of the reports themselves. Let us look first at the process.

I suggested above that reports are inspired by the stench of patterned brutality seeping out of states which have slipped the reins of legal and moral restraint. In fact that is not invariably the case. Occasionally states seek a Commission initiative. They may do so to placate a domestic¹⁶ or a foreign audience.¹⁷ Normally, however, the Commission takes the initiative on the basis of credible evidence that the target

16. Responding to the negotiating demands of M-19 guerrillas holding diplomatic hostages in Bogota's Dominican Embassy, President Turbay Ayala invited the Commission to visit Colombia immediately. The Commission agreed on the understanding that the invitation was one to conduct an on-site inquiry leading to a general report. A week after its arrival, the hostage crisis was peacefully resolved. Some months later, the Commission issued a general report. In addition, pursuant to the agreement with the Government which triggered settlement, Commission maintained a continuing presence in the country to monitor the trial of the M-19 leaders who had been awaiting trial at the time of the embassy occupation.

17. When in 1977 the United States Senate was debating the Panama Canal Treaty, President Omar Torrijos invited the Commission to visit Panama and, as he put it, to vindicate his reputation which had been assailed on human rights grounds by treaty opponents. The Commission offered no guarantees on that score, but it did accept the invitation and it subsequently issued a report which, while noting a variety of acts inconsistent with human rights norms, also implicitly absolved the government of charges that, like many other governments at the time, it was murdering, torturing and arbitrarily imprisoning its opponents.

government has seriously transgressed fundamental norms. Once it has voted to prepare a report, the Commission informs the concerned government and requests permission to conduct an on-site inquiry pursuant to the procedural rules included in its Regulations. Those rules give the Commission a broad discretion to collect information by means it deems appropriate and obligate the government to extend its full cooperation. Full cooperation includes publicizing the Commission's visit and encouraging citizens to provide the Commission with any pertinent information.

Visits are generally high profile events amply reported in the national media. The Commission will normally be received by the Head of State and will meet with various ministers and lesser officials. These meetings are rarely mere exercises in Protocol. They are discussions, often vigorous, in which the Commission lays out its concerns about legislation, decrees, processes, as well as concrete instances of what has been alleged to be misconduct, and government representatives offer interpretations, explanations, rebuttals, etc. In countries where senior officials are not implicated in conspiracies to violate human rights, these exchanges can themselves be of some value. After all, particularly in large countries, political leaders at the highest levels of government lead an existence which is hectic and cocooned from the day-to-day grinding of the administrative apparatus. Heads of state often rely heavily on subordinates to shape their cognitive priorities and within those priorities to winnow the relevant facts. An imminent visit of the Commission concentrates the mind albeit not quite so effectively as the belief one will be executed on the morrow. Battalions of subordinates, aided by the Commission's staff, will anticipate the issues and particular incidents the Commission will wish to explore. They will pump facts into the chief executive and ministers and generals. In other words, before the Commission arrives with its pneumatic cranes, the government itself will start lifting and looking under the rock of ignorance, inadvertent or willful, beneath which the front-line machinery of official power has been grinding up life and hope. Preparation for the visit can also affect the balance of power within an administration; it should reinforce officials in positions such as that of public procurator charged with responsibility for defending the rule of law.¹⁸ If, in the past, they have not had ready access to or much influence on the head of government, this should be their time.

Again assuming that the government is not hopelessly implicated in or, still worse, committed to strategies of repression, illumination may precipitate directives for change, for instance in prison conditions. I am talking about something more than a quick cleaning of the abattoir so it will not stink for the Commission. Even totali-

18. Gross violations of international human rights standards are almost invariably also violations of constitutional norms.

tarian regimes may play that game. I am talking about changes of a lasting character, changes in operational norms and systems for monitoring compliance.

The Commission's actual arrival and its ensuing inquiry can be a more powerful catalyst of change. As it meets with ministers and other senior officials, it quickly learns which of them are its allies in the defense of human rights. In its subsequent discourse with the media, it can subtly reinforce them. And the sheer sense of connection to a sympathetic external environment manifest in the Commission can gird loins for future combat. Another feature of a Commission visit is dialogue with representatives of all sectors of the population: Industrialists, landowners, lawyers, union leaders, academics, students, peasants, and so on. In these dialogues, Commission members reaffirm the international minimum standard, which is particularly important in societies reeling from political terrorism, inclined to feel that they cannot fight by the normal rules and therefore vulnerable to the claim that human rights are, temporarily, an unaffordable luxury.

That was the mood the Commission found among many thoroughly decent Argentines at the time of its 1979 visit precipitated by the disappearance of many thousands of mostly young men and women. In a initially tense meeting with leaders of the bar, the latter coldly (one could feel the chill of anger contained by decorum) insisted that the Commission needed to appreciate the circumstances leading to the military's assumption of supreme power and the launching of its anti-subversive campaign. They recounted a nightmare of daylight gun battles between paramilitary forces of the left and right, of bombs in universities, homes and elegant arcades. It was virtually a civil war, they said, but a "dirty" one rendered worse by its clandestine character. Such conditions, they implied, demanded extraordinary measures.

Speaking on behalf of the Commission, I tried to convey empathy, to reflect our appreciation of the conditions they so graphically invoked. And then I summarized the Commission's doctrine. It is our position, I said, a position commanded by the norms we are obligated to apply, that governments have not only the right to maintain order, they have a duty. For acquiescence in private violence is collusion. And in times of emergency, governments have the authority under international norms to suspend most of the rights enumerated in the international declarations and conventions. They can restrain freedom of assembly, speech and press. In extreme circumstances they can go so far as temporarily to detain persons merely on the basis of reasonable suspicion that they constitute a threat to public safety. In fact, about the only things governments cannot do is murder, torture, and convict people without giving them a fair opportunity to prove that they are not guilty.¹⁹ That simple reaffirmation of the international standard melted the ice between us. The chill vanished.

19. See *Report on the Situation of Human Rights in Argentina*. (OAS/Ser.LJ/V/II.49, doc.19 corr.1, 11 April, 1980) pp.26-27.

We agree, they almost shouted collectively. And so that evening we all dined together.

The Commission has also tried with some success to leverage its visits through hints about how steps taken immediately to alleviate egregious conditions could affect the tone of its final report. Forming the hint's content were a set of preliminary conclusions and recommendations communicated to the government at the end of a visit. They focused on directly apprehensible and manifestly unreasonable, unnecessary or cruel practices. In essence, the Commission would suggest that immediate mitigating action by the government would inevitably affect the tone of the final report and would be noted therein.

For instance, at the end of its Argentine visit, the Commission urged Government leaders to enforce in the case of persons held for alleged security offences a penal regime no more severe than that imposed on murderers. The latter were out of their cells most of the day, played sports, enjoyed what appeared to be relations of mutual tolerance with their guards and had ready access to newspapers and journals. The former were held in closet-sized cells for twenty-three out of twenty-four hours under constant surveillance, were allowed to read nothing but the sports and society pages of provincial newspapers, and were brutally punished for violation of rules frequently changed without notice. Shortly after our visit, we received word from human rights circles in Argentina that our recommendation had been implemented.

Preliminary recommendations to the Sandinista regime, which had as one of its first acts invited the Commission to see the post-Somoza reality, had more extensive mitigating effects. The Sandinistas were holding thousands of former members of Somoza's National Guard pending trial. Having ruled for many years largely through cooption and exemplary punishment ("pour encourager les autres"), backed by his reputation as the Gringo's man in Central America, Somoza had not needed to build many prisons. So the Sandinistas had had to pen the former soldiers into fetid sheds. We could not deny that these former soldiers, members of an armed force more personal than national in its loyalties, represented a threat to the new government. And having concluded in our report on Somoza that this army had been hip deep in cruel abuses of the civilian population and Sandinista militants both during and before the civil war, we could not easily contest the Sandinistas' desire to detain for purposes of screening out and prosecuting torturers and murderers. Thus they had a strong case for detention and little immediate capability for much improving the conditions of detention. But given those conditions, we suggested, might not a more humane balance be struck, was it indeed not required, in the case of detainees who, because of their age or wounds, were not likely to pose an internal security problem. We emphasized women, who had performed auxiliary services in the National Guard, and Guardsmen with serious wounds and mutilations incurred in the recent conflict. Also persons over fifty-five, of which there were a few. Before we left, Tomas Borge, Minister of the Interior, ordered the

release of virtually all women. And we were informed shortly thereafter, that, following our suggested criteria, the Government had released additional persons. While the overall numbers were small, one could hardly call the human consequences trivial.

The open, manifestly even-handed and systematic, and well-publicized process of fact-finding, together with the Commission's official status, the government's formal respect, the fact that its members have been nominated and elected by governments: Collectively these elements lend weight and prominence to a Commission report which non-governmental organizations can rarely match. In the final days of his dictatorship, Anastasio Somoza of Nicaragua submitted himself to questioning by journalists on a United States TV talk show. The Commission's damning report had already appeared. Like many non-governmental organizations, its members had collectively indicted Somoza for a vast array of human rights violations. Questioned about his human rights record, Somoza dismissed his critics as persons sympathetic to communism and the terrorism it inspired. Are you suggesting, his interlocutor asked, that the members of the Inter-American Commission on Human Rights are Communist inspired? Somoza flinched. No, he said, they were simply misinformed.

During the era of state terror, Commission reports recounted the massive violation of human rights in Haiti, Guatemala, El Salvador, Nicaragua under Somoza, Chile, Paraguay, Uruguay and Argentina and exposed serious though less grave and systematic violations in a number of other countries including Colombia and Nicaragua under the Sandinista regime. Some had as much effect as a leaky, message-bearing bottle tossed into the sea. Looking back now, it would appear that exposure shook delinquent regimes in cases where they had internal tensions and contradictions and, paradoxically, where one or another of the following conditions obtained: Continued grave violations no longer seemed essential to the regime's core goals or parts of the regime began to doubt that repression alone would suffice to achieve its ends.

Argentina illustrates the first of those conditions. More than a year before the Commission published its searing report revealing the details of the government's campaign of extermination, the military had pulverized the two powerful revolutionary movements that had attempted an armed challenge to the status quo. Military moderates saw their task simply as one of cleaning up around the edges. Opposed to them were an extremist, arguably proto-fascist clique inclined to detect the roots of a continuing subversive potential among Jews, other cosmopolitans, intellectuals, agnostics, and free thinkers generally. The breadth of their threat definition was exemplified in a quote attributed to one member: First we will kill the subversives; then those who helped them; then those who did not help us.

Unlike the Guatemalan armed forces, an isolated, ferociously collegial state within the state and socially a cut below the land-owning/industrial oligarchy, the military profession in Argentina was substantially connected to the higher social classes, shared their general ideological outlook and depended psychologically on their willing acquiescence, if not active approval. The military extremists had civilian counterparts; but they were a small embittered tranche of the respectable layers of society. Military moderates articulated with social moderates, conservative (sometimes liberal in the Nineteenth Century sense) but not reactionary, open to the ideas and values of the wider Western world. Fearful of revolution, fed up with violent disorder, they had welcomed the overthrow of the feeble, corrupt government which was Juan Peron's last legacy to the nation and welcomed as well the ensuing anti-subversive campaign.

The military establishment had consciously ignored the first calls for merciful termination of Isabel Peron's chaotic administration, choosing to wait until an indisputable consensus for action had hardened among civilians. Civilians wanted action, but in the event not the carefully planned terror campaign which quickly unfolded. By their nature, such campaigns are disorderly. Well-bred officers may plan them; but their execution requires the aid of ruffians recruited from the most sinister corners of society. And, when restraints are snapped and impunity reigns, the very order notionally being defended begins to shake. Personal agendas displace public ones. And even the public ones are advanced by means from which moderately decent people flinch.

The respectable classes wanted to believe that in the course of a legitimate campaign against subversion, a "dirty war" in which their armed forces were the defenders, nothing more than abuses had occurred as they will in any war, never mind one against clandestine opponents. Conversely, they did not want to believe that their agents were rounding up thousands of men and women often on the basis of the slightest suspicions, torturing them pitilessly and then murdering them and concealing their broken corpses. The Commission's visit restored voice to the mass media which had managed in the preceding three years not to mention the word "disappeared." One felt movement in the tectonic plates of respectable opinion. Its report eviscerated the option of belief in mere abuses. The plates moved more, cracking the foundations of military elan and unity. Invading the Malvinas was an obvious stratagem for remobilizing public opinion and restoring the foundations. When it failed, the military regime came tumbling down.

The Commission's experience with El Salvador reinforces conviction that the efficacy of the visitation process and, above all, reports varies significantly with the pluralism of the target government and society. From the early 1930s until 1979, the military establishment ruled El Salvador in collusion with a very small landed/industrial oligarchy behind periodic electoral *trompe-l'oeil*.²⁰ Unlike

20. See, e.g., James Dunkerley, "El Salvador since 1930," in Leslie Bethell, ed. *Central America Since Independence* (Cambridge: Cambridge University Press, 1991) 159-90.

Guatemala, where language and culture divided the indigenous peasant majority from working class mestizos and from each other, the poorer classes and much of the middle as well were mestizo, sharing a common culture. The country was much smaller and communication and transportation much better developed nationally than in Guatemala. An export-oriented agriculture and light industry, organized by reputedly the most efficient entrepreneurial class in Central America, had contributed to the emergence of a relatively large middle class able to combine for political purposes with a self-conscious working class. Whether because of these cumulatively distinguishing elements or for some more complicated set of reasons, civil society grew in the very face of a repressive military regime. Teachers, workers, civil servants, campesinos, and other groups achieved a degree of organization unknown in Guatemala. So had a guerrilla movement, based in the countryside but entwined with a strong structure of supporters and sympathizers in the cities, above all in the capital.

On the eve of the issuance of a blistering Commission Report²¹ whose content was generally known in the country, a group of reformist officers seized power and incorporated into the new governing junta leading figures from the middle-class opposition, politicians with whom Commission members had had to meet secretly less than a year before. One of them later said that the coup had been intended to coincide with the report but, believing themselves discovered, the organizers had struck before they could be neutralized.²² These events occurred against a backdrop of pleas for reform emanating from the Carter Administration in Washington and the fall of Somoza.

Within two years, all hope of reform had yielded to the reality of a murderous civil war. The guerrillas had responded to the coup by launching an all out offensive which the military beat back with the aid of arms dispatched in its last days by the same Carter administration determined in this case, having failed in Nicaragua, to induce reform without getting revolution. Confronting what they perceived as a threat to their very survival, encouraged by arms from Carter and assurances of support without moral restraint from the incoming Reagan Administration, officers and oligarchs (the latter by financing paramilitary groups) launched a campaign of extermination against the guerrillas' urban infrastructure. They leaped upon the organizations seen to be controlled by guerrilla supporters and sympathizers and tore them to shreds. The public square filled with blood and the remains of a substantial part of civil society. And the killing went on, year after year, along with its exposure by the Commission, non-governmental human rights organizations and the international media.

21. Report on the Situation of Human Rights in El Salvador (OAS, Washington, D.C., 1978).

22. Personal conversation with a well-informed, confidential source occupying, at the time, a senior position in the government of El Salvador.

“For example” is not, of course, scientific proof. But where it supports an a priori credible hypothesis, we have a decent basis, indeed the only real basis for making public policy. The history of the last two decades suggests that Commission reports and the process by means of which those reports are prepared work far more effectively in the very conditions which mark the contemporary moment. Governments and ruling classes are not engaged in wars of survival. Civil society enjoys unparalleled vigor. There is space for voice and compromise. Exposure of human rights violations may, under these circumstances, delegitimize particular politicians and the prestige of the armed forces, but they do not threaten the fundamentals of the political order which in almost all countries, at least for the time being, are not contested. Odd moment, is it not, to call for a transfer of energy away from the general reporting mechanism? Odd, unless that thing called “promotion” offers superior and hitherto unappreciated potential for the enhancement of human rights.

Promotion: Meaning? Comparative Advantage?

For the moment, collapse of belief in the revolutionary project seems just short of total. While revolutionary nuclei linger on in Peru and Colombia, zealots can rationally harbor no higher hope than negotiated insertion into a somewhat revised constitutional system. Violations of human rights remain a commonplace of life in many countries; but, again with a very few exceptions, they no longer are dramatic incidents in ideological civil wars.

Ideological conflicts cut across class lines. In such conflicts, middle-class activists share with leaders sprung from the poor not only the formulation of strategy, but also its execution, which in the case of most insurgencies has a tendency to end in execution. The era of romantic revolutionism having passed, the poor are left largely on their own to play the victim's role. On the whole, the delinquencies they endure are much less telegenic than in the recent past, are much less the product of grand strategies than of the daily brutalities indifferently inflicted by the official world through its acts and omissions on behalf of order and the gross national product. Active malevolence is the province of lesser officials, often little different in class origin from their victims, but singled out by chance or a taste for rough trade and hopeful of moving a rung up on the ladder. In the role of police and prison and private security guards (licensed or at least tolerated by the state), they occupy the harsh front lines of the struggle for social order in a world where poverty no longer decimates, religion no longer constrains and images of affluence goad the young.

Whether in this new world or any other, for that matter, what forms may human rights *promotion* assume? The various activities that might reasonably be organized under that heading can usefully be subdivided into three discrete clusters. One consists of measures designed to enhance the professionalism the rationality and efficiency —of public institutions like courts, police and welfare bureaucracies whose

acts and omissions fall heavily on the poor. Another incorporates all activities intended to strengthen non-governmental organizations, particularly those like human rights and civil liberties groups, private welfare and legal aid societies—which directly serve the poor. Aid to political parties attempting to aggregate and advance the interests of the lower classes also has a rational place in this cluster. Finally there are a potentially wide range of educational programs designed to heighten awareness of human rights and the means for their protection. They can be directed to the public at large through the mass media or to specialized audiences such as teachers and students, police and military officers, judges, etc. . Documentary films, lectures, seminars, textbooks, curriculum plans: These are some of the potential vehicles for the attempted construction of a culture in which the language of human rights becomes a privileged discourse.

The virtue of the promotional project is too evident to require either justification or the pedant's footnotes. The issue, however, is whether, for the advancement of that project, the Inter-American Commission on Human Rights has any comparative advantage and whether, if it were to assume a primary role in this area, it could do so without seriously compromising its other missions. It should be evident to any reasonable person that the answers to these questions are, respectively, "no" and "yes."

Let us begin with the second one. Governments, scholars and non-governmental organizations have criticized the Commission for failing to process cases efficiently. In recent years, hearings have been desultory and the case records sent to the Inter-American Court have sometimes been so deficient in coherence and detail that the Court has felt it necessary to hold *de novo* hearings in order to establish the facts.²³ There is now a broad consensus that a good part of the problem arises from inadequate staffing. Some critics have also called for an increase in the size of the Commission and conversion of the Commissioners from part-time volunteers to full-time functionaries. As I have noted elsewhere,²⁴ this latter proposal seem to me singularly unwise.

Despite the fact that they are elected and nominated by governments and not infrequently are parts of the governing establishment of their respective countries, Commission members have with very few exceptions displayed an admirable independence and objectivity in their conclusions and recommendations. On the basis of my experience as a Commission member and my participation in or study of other official institutions, a principal reason for the behavior of members is their small number. A group of seven, working together intensely, viewing often gruesome evidence, hearing the same testimony, intimately sharing the discomfort, ten-

23. See *New Vision*, Note 4 above, pp. 9-10.

24. "No Longer a Unicorn, Not Yet an Ox." Note 9 above.

sion, even occasional risks of on-site inquiries, form distinctive collegial bonds. When, having formed such bonds and having viewed and heard the same evidence, they turn to the preparation of a report, no one of them can easily flinch from telling truths. Thus, it appears to me that proposals for a larger Commission must spring from a failure to appreciate the way in which the character of small groups protects the Commission's integrity.

Proposals to make Commission membership into a full-time occupation seem to me equally misconceived. A reason in addition to their size for the quality of their work is the voluntary character of their position. It is not a job with a salary and a comfortable pension at the end. One does it out of moral conviction or for the honor or prestige or all of those things, things that are lost by abuse of the office, abuse ineluctably evident to colleagues and, through them, ultimately to a wider audience.

A full-time Commission would convert membership into a job, one with comfortable but by no means luxurious benefits, on a par, perhaps, with a national appellate court judgeship both in terms of its prestige and emoluments. It would appeal mostly to judges, diplomats and academics approaching (or having already reached) retirement, men and women who in a long career had shown sufficient deference to received opinion to earn nomination, men and women not, on the whole, disposed to be adventuresome. It would appeal least to immensely able, ambitious and successful people approaching or already enjoying the full promise of their career. At an absolute minimum, it would dramatically shrink the pool of attractive candidates. Certainly the Commission's greatest leader, Andres Aguilar of Venezuela, would not have yielded his positions as General Counsel of the National Oil Company or Ambassador to the United Nations or Ambassador to the Law of the Sea Conference in order to serve on the Commission.

No doubt the staff could be much enlarged and also improved by insisting on competitive examinations to create a short list from which the Commission (rather than, as now, the Secretary-General) could select the ablest and most dedicated candidates. But however large and skilled the staff²⁵ and however fine its work, it is the Commission which must in the end hear and decide cases. For the reasons elaborated above, case work is important for the defense of human rights, and reports even more so. The Commission, particularly if its staff were enhanced, could cope adequately with its existing and prospective load, but just barely. How, then, can it take on substantial projects in the promotional field without compromising its core work? Or is that the point?

25. To speak of an enlarged staff at a time when the OAS as a whole totters along on the edge of bankruptcy and leading states show no disposition to increase their contributions (some indeed fail to meet even their existing obligations) may seem just a little Pollyannaish. But that is by-the-by.

If there were no other players in the field, the case for some reallocation of Commission energies might not be so palpably weak. But of course there are. Furthermore, in relation to many other players, the Commission has no comparative advantage. Quite the contrary. To begin with, Commission members almost invariably come from a legal background. They are, after all, interpreters and appliers of the law. They need a solid grasp of national and international precedents and procedures. So does their staff. Neither staff nor Commission members are or should be selected because they happen, as well, to be experts in judicial and public administration, curriculum planning, the management of non-governmental organizations, and other specialities connected to the promotional functions enumerated above.

Were it to plunge into promotional activities, the Commission would find itself amateurishly duplicating the work of professionals. In the area of human rights education, the Inter-American Institute for Human Rights in San Jose takes the lead among regional transnational institutions. Within the United Nations family of organizations, UNESCO is equipped to be of some help. For assistance in improving the quality of public and judicial administration, governments can now look to the Inter-American and World Banks, and national foreign assistance programs like those of the United States and Canada, and to the European Union. Strengthening non-governmental institutions is a task that has been effectively assumed by a variety of organizations including the Washington-based International Human Rights Law Group, the parastatal National Endowment for Democracy and the German political party-connected foundations like the Social Democrat's Friedrich Ebert Stiftung and its Liberal and Christian Democratic counterparts.

Aside from lacking funds and expertise, the Commission would in some cases be inhibited by tension between its core and promotional activities.²⁶ Since non-governmental human rights organizations frequently petition the Commission on behalf of alleged victims, appearing in effect as plaintiffs viz-a-viz the government as defendant, assistance to them would clearly be inappropriate. And since the Commission has jurisdiction over cases of electoral fraud or coercion, and this is the one type of case which still evokes furious claims of intervention in domestic affairs, any involvement in political party activity and arguably any electoral involvement at all would seem imprudent if not invariably improper. Nor is there a much clearer case of duplication. For it was precisely to assist in the organization of fair elections that the OAS established its Unit for Democracy.

26. See *New Vision*, Note 4 above, at p.21: "As the [Commission] and its executive Secretariat is presently constituted, it is only with great difficulty that it carries out this important work [i.e. promotion]. Besides the obvious resource concerns . . . there exists a structural problem as well. If a member state wishes to approach the inter-american [sic] human rights machinery with a request, for example, to assist in establishing a human rights national office or ombudsman, the member state is faced with the disjunction of being assisted and judged by the same body." p. 21

Conclusion

Shifting any substantial part of the Commission's energies from reports to promotional work is an idea whose time should never come. The Commission can, however, contribute to the promotional work of others through the way in which it chooses to organize its core reporting function. The contribution I have in mind would occur in two linked areas: governance, with special reference to the rule of law; alleviation of the economic and social conditions which incubate the dialectic of criminal violence and repression.

"People say law, but they mean wealth," Ralph Waldo Emerson wrote in his journals,²⁷ presumably as a way of reminding himself and the rest of us that law's equal application is an ideal from which all societies fall very short. Narrowing the gap between ideal and reality in the Western Hemisphere is a way of summarizing the Commission's entire mandate which it has labored to execute in large part through its country reports. When states varied widely on the scale of human rights delinquency, country reports valuably distinguished among them, highlighting the real outlaws. Today the peaks are closer to the plains. And violations are only rarely the result of high state policy. Rather, as I suggested earlier, they are routinely ground out by the acts and omissions of executive and judicial officialdom, less consciously cruel than morally numb. In this blander environment, what needs to be highlighted is the indifferent, almost inadvertent cruelty of day-to-day life.

How, for instance, do the various systems of justice respond to the complaints of battered and raped women, to charges of police brutality? How are the police and judges who will receive these complaints trained, guided and reviewed? Where does a poor person turn to regularize title to the postage stamp of property on which he or she has with harrowing effort constructed a home and what happens when they find the notionally appropriate office? By what means and according to what criteria does the state distribute entry-level jobs in its many agencies? Are punishments for the same crime roughly equal? How long are persons detained without trial and what recourse do they have, if any, to challenge their detention or to secure compensation for failure by the state to comply with its own procedural rules?

I have yet to meet anyone familiar with Hemispheric governance who believes that the poor anywhere enjoy anything remotely resembling equal access to the law and predictable enjoyment of its nominal benefits. In this respect, the performance of different governments is bound to vary over time and in relationship to each other. Like Tolstoy's unhappy families, the precise reasons for failure will be particular to each time and place; but like his happy families, there will also be common expla-

27. Quoted in Rhoda Thomas Tripp, *The International Thesaurus of Quotations* (Middlesex, England: Penguin Books 1979).

nations. Commission country reports, of which there can be no more than a very few each year, will not capture the generic elements. Therefore, it should increasingly attempt thematic reports in which, after careful multi-country study perhaps of a single feature of the judicial and administrative order, it exposes the precise ways in which the law fails utterly to provide the poor with a framework of reasonable expectations within which they can attempt, still against the great odds occasioned by their position in contemporary Western Hemisphere market economies, to maintain a dignified existence.

Conducting such studies independently requires a quality and quantity of staff work that the Commission has no present prospect of achieving. Yet the task is appropriate, indeed required of this regional law enforcement agency. So the Commission must coordinate with corporate bodies that do have the means and have at last decided so to construe their own mandates that they have the obligation. I refer, of course, to the international financial institutions. What I specifically envision is related even if not formally joint missions of inquiry. The Commission's task will be to identify and publicize lesions in the legal order, though it may coincidentally identify relative achievement, something that will be possible only if it undertakes multi-nation thematic studies. The experts dispatched by the World or Inter-American Banks would be present either to review past projects or to identify new ones for it to finance. If Governments see a connection between a Commission inquiry and increments of financial assistance, they should be more inclined to cooperate.

Promotion must remain essentially the province of actors other than the Inter-American Commission on Human Rights. But through the essay in cooperation I have outlined, the Commission will contribute to promotion even as it exercises its traditional and still required role as the main line of regional defense for human rights in the Western Hemisphere.